NO. 83-1400

in the
Supreme Court
of the
United States

OCTOBER TERM, 1983

BISCAYNE FEDERAL SAVINGS & LOAN ASSOCIATION and KAUFMAN & BROAD, INC.,
Petitioners,

vs.

FEDERAL HOME LOAN BANK BOARD and FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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1. The Decision Below Raises An Issue Of Great Importance, Which Should Be Resolved By This Court.

The Petition sets forth in detail the reasons why this case presents a question of great public importance which should be resolved by this Court. Pet. 15-19. In its opposition, the Federal Home Loan Bank Board ("Bank Board") does not deny the importance of the question presented.

2. **The Court of Appeals Decision Precludes The Judicial Review Mandated By Congress And By This Court's Decisions.**

With regard to the merits, the Bank Board simply begs the question, saying the Eleventh Circuit decision is not one which precludes judicial review. Brief in Opposition ("Br. Opp.") 6-7. That is manifestly incorrect.

As the Bank Board's own Brief confirms, the application of 12 U.S.C. §1464(d)(6)(a) requires (1) a threshold jurisdictional determination that there is a statutory ground for receivership, such as insolvency; followed by (2) a determination by the Bank Board whether to exercise its "discretion to appoint a receiver where such a condition exists." *See* Br. Opp. 7 (footnote omitted).[1] The question presented here is whether decision Number Two—the decision to appoint a receiver—is subject to judicial review. By answering that question in the negative, the court of appeals has clearly precluded judicial review of that issue. *See* App. 12. But the Bank Board argues that judicial review of issue Number One means there has been no preclusion of review with regard to issue Number Two. Br. Opp. 6-7, 8.

This Court has rejected that position. " 'The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. . . . ' " *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (citation omitted). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts *restrict* access to judicial review." *Id.* (citation omitted; emphasis added).

In order to avoid review, the Bank Board makes five additional arguments. First, the agency says that, where a

[1]In its opposition the Bank Board concedes that numerous other institutions were, as of January 1983, what the General Accounting Office has termed "technically insolvent." Br. Opp. 2; Comptroller General of the United States, *The FSLIC Insurance Fund—Recent Management And Outlook For The Future* 40 (October 14, 1983). A receiver was *not* appointed in the vast majority of those cases. Plaintiffs' Exhibit 147.

statutory ground for receivership is met, Congress "gave the Bank Board discretion to appoint a receiver . . . ." Br. Opp. 7 (footnote omitted). This is true, but the question is whether that discretion is reviewable or unreviewable. Construing the Home Owners' Loan Act, this Court has said, "Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority *or acted arbitrarily*." *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 102 S.Ct. 3014, 3022 (1982) (citation omitted; emphasis added).

Second, the Bank Board urges that "'swift action is often necessary to minimize economic loss in instances of troubled and failing financial institutions.'" Br. Opp. 7. Biscayne agrees. That is why the statute authorizes quick action through an ex parte seizure. 12 U.S.C. § 1464(d)(6)(A). But the counterbalance is a prompt post-seizure hearing, *id.*, which Congress mandated to assure that savings and loan associations receive "fair treatment from the Government, and ... a reasonable degree of protection from Government actions which might ... [de]generate into arbitrary, capricious, and overbearing tactics." S. Rep. No. 1482, 89th Cong., 2d Sess. 3(1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 3535; *see* Pet. 23.[3]

Moreover, as the court of appeals conceded, the Act contains no limitation on review. *See* App. 8. Instead, the statute contains broad language to effectuate the congressional policy: "Except as otherwise provided herein, the Board shall be subject to suit ... by any federal savings and loan association ... *with respect to any matter under this section* ...." 12 U.S.C. § 1464(d)(1) (App. 166) (emphasis added). Equally expansive is the language of 12 U.S.C. § 1464(d)(6)(A) (App. 167), which provides for "an action in the United

[3]That is also sufficient answer to the Bank Board's suggestion (Br. Opp. 7 n. 6) that the modification of its ex parte appointment powers in 1966 were intended to immunize receivership decisions from judicial review.

States district court . . . for an order requiring the Board to remove such conservator or receiver," and requiring that the court make a determination of the issue "upon the merits."

Third, the Bank Board relies on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), to shield its decision to appoint a receiver from judicial review. Br. Opp. 7-8. But this Court has forbidden the invocation of *Vermont Yankee* "as though it were a talisman under which any agency decision is by definition unimpeachable." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S.Ct. 2856, 2870 (1983).

Fourth, the Bank Board relies on *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185 (1975) for the proposition that the choice of remedy " 'is peculiarly a matter for administrative competence.' " Br. Opp. 8. But the Home Owners' Loan Act compels a different result. Congress has, in 12 U.S.C. § 1464(d)(6)(A), created a civil action for the exclusive purpose of removing a conservator or receiver, thus treating that "remedy" differently. To engraft *Butz* here would " ' "paralyze . . . what [Congress] sought to promote . . . ." ' " *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 513 (1981) (citations omitted).

Fifth, the Bank Board attempts to avoid Section 1464(d)(6)(A) by asserting that the question presented by this case is whether the statutory criteria for receivership were satisfied, as set forth in 12 U.S.C. §1729(b). Br. Opp. (I). By so stating, the Bank Board endeavors to shield a significant substantive error in the court of appeals' opinion, stemming apparently from the court's failure to note the provisions of 12 U.S.C. § 1724(d). *See* Pet. 25 n.18; App. 170-71. The Bank

Board reliance on Section 1729(b) is incorrect. *See* Pet. 25 n.18.[3]

3. There Is Conflict Among The Courts Of Appeals And The District Courts On The Reviewability Of A Receivership Appointment For A Financial Institution.

The Bank Board concedes that there is a division of authority on the availability of review under the National Bank Act, 12 U.S.C. § 1 *et seq.*, but urges that National Bank Act cases are "irrelevant." Br. Opp. 9. In the Eleventh Circuit, however, the federal agencies took a different position. The Federal Deposit Insurance Corporation, for example, relied on National Bank Act precedent, not the Home Owners' Loan Act. Brief Amicus Curiae of the Federal Deposit Insurance Corporation, at 6-7, *citing In re Conservatorship of Wellsville National Bank*, 407 F.2d 223 (3d Cir.), *cert. denied*, 396 U.S. 832 (1969); *United States Savings Bank v. Morgenthau*, 85 F.2d 811 (D.C. Cir.), *cert. denied*, 299 U.S. 605 (1936); *In re Liquidation of American City Bank and Trust Co., N.A.*, 402 F.Supp. 1229 (E.D. Wis. 1975); *In re Franklin National Bank*, 381 F.Supp. 1390 (E.D.N.Y. 1974). Similarly, the letter submissions of the Comptroller of the Currency and the National Credit Union Administration each contained a discourse on their respective statutory schemes. Appellants' Reply and Answering Brief, Appendices A and B. And the Bank Board incorporated into its own brief an unpublished opinion from the *Washington Federal* case, which stated: "In determining that the abuse of discretion (arbitrary-capricious) standard of review applies [under the Home Owners' Loan Act] . . . , this court applies *the same standard*

[3]In its brief, the Bank Board never explains the relevance of 12 U.S.C. §1729(b), nor does it disclose the effect of Section 1724(d). The Bank Board's own resolution appointing the receiver relied exclusively on Section 5 of the Home Owners' Loan Act, 12 U.S.C. §1464, to make the appointment. App. 158-59. The resolution confirms what Biscayne has explained (Pet. 25 n. 18): the National Housing Act, 12 U.S.C. §1729(b), sets forth the "powers and duties of [the] receiver," App. 159-60, and comes into play *after* a receiver has been appointed. 12 U.S.C. §1724(d), §1729(b) (App. 170-71); *see* Pet. 25 n. 18.

of review that has judicially evolved in a challenge to the appointment of a receiver by the Comptroller of the Currency under 12 U.S.C. § 191." Washington Federal Savings & Loan Association v. Federal Home Loan Bank Board, No. C80-443, Memorandum and Order at 9-10, (N.D. Ohio Dec. 18, 1980) (emphasis added), *reproduced in* Brief of Appellants, Appendix C. *See also* Pet. 26.

Having solicited these submissions, and having transmitted most of them to the Eleventh Circuit as part of its own briefs, the Bank Board cannot now be heard to say that National Bank Act precedent has no bearing here.

With regard to the Home Owners' Loan Act, the Bank Board asserts that no decisional conflict is presented by *Washington Federal Savings & Loan Association v. Federal Home Loan Bank Board*, 526 F.Supp. 343 (N.D. Ohio 1981) or *Fidelity Savings & Loan Association v. Federal Home Loan Bank Board*, 540 F.Supp. 1374 (N.D. Cal.), *rev'd*, 689 F.2d 803 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 1893 (1983). Br. Opp. 9, 10 & n. 8. That, too, is incorrect.

The Bank Board maintains that *Washington Federal* "held that judicial review is limited to the question whether the Bank Board abused its discretion in concluding that one or more of the statutory grounds for appointing a receiver exists." Br. Opp. 10 n.8. The court neither said so nor did so. *See* Pet. 27. The *Washington Federal* court first determined that a statutory receivership ground had been met, 526 F.Supp. at 387-88, and then conducted (among other things) the inquiry whether the Bank Board itself was responsible for Washington Federal's condition. *Id.* at 390. If the Bank Board were correct, the district court would have concluded its analysis with the determination, *id.* at 387, that Washington Federal was in an unsafe and unsound condition. The Bank Board mischaracterizes the "subsumed" requirement, 526 F.Supp. at 354, 390, which is a test for relevance. *Id.*; *see* Pet. 27.

The Bank Board declines to analyze *Fidelity*, merely asserting that it was "reversed." Br. Opp. 10. But the reversal left undisturbed the trial court's holding that where a statutory receivership ground exists, the administrative decision to appoint a receiver is reviewable for abuse of discretion. *See* Pet. 28; 540 F.Supp. at 1378.

4. The Bank Board Acted Arbitrarily And Capriciously.

Since the Bank Board is understandably embarrassed that the district court found "the Board's conduct . . . 'outrageous,' 'outlandish,' 'egregious' and 'wrapped in a shroud of deception,'" App. 6 (footnote omitted), the agency endeavors to recharacterize some of the district court findings. Thus, the Bank Board says Biscayne "sought a $25 million nonrepayable gift of public funds from FSLIC to help restore Biscayne to solvency." Br. Opp. 3. But the district court found that Biscayne's preferred alternative was the branch sale, and "Biscayne did not seek one cent of FSLIC money as part of that proposal." App. 60. It was the Bank Board which expressed a preference for the recapitalization proposal involving a $25 million nonrepayable contribution by the FSLIC. *Id.* at 62-65, 121.[4]

The Bank Board claims the district court found this was purely a case of staff misconduct. Br. Opp. 4. But the district court found that, with the Board's approval, "the staff is formulating Board policy and guidelines on a case-by-case basis under the direction of the Chairman." *Id.* at 117; *see id.* at 115. In the present case the Chairman personally directed the staff, *id.* at 60-61, 65-66, and on February 7, 1983, the Bank Board itself (consisting at that time of only

[4]The Bank Board also asserts that the branch sale was "'simply an accounting gimmick.'" Br. Opp. 3 n. 3. But the Bank Board fails to note the district court's finding that the "accounting method was first suggested by [FSLIC Director] Beesley," App. 61, and was based on purchase accounting techniques. *Id.* at 51; *see id.* at 135 n. 22. The district court also found that by January 1983 the agency staff had evolved a different method of accounting for the transaction, *id.* at 58, 59, 60-61, which Biscayne had agreed to accept. *Id.* at 65.

Chairman Pratt and Board Member Jackson) met with the key staff to provide specific direction regarding the conduct of the negotiations. *Id.* at 72.

Likewise incorrect is the suggestion that the arbitrary and capricious conduct was confined to January through March 1983. Br. Opp. 4. The district court actually found a "continuing *deception* from January 1983 through March 1983," App. 122 (emphasis added), but found the arbitrary and capricious conduct started much earlier, during the branch sale phase, *id.* at 118, which began in August, 1982. *Id.* at 49, 88. The district court found:

> From August 9, 1982 to January 5, 1983, Biscayne went from a mere $3.83 negative net worth to the very substantial sum of $22.50 million negative net worth.
>
> * * *
>
> . . . [By January 14,] [o]ne hundred and fifty-eight days had . . . elapsed and FHLBB still had Biscayne shadow boxing in its own lightless bank vault.

App. 60, 62.

The Bank Board contends that, "The district court, however, did *not* find any causal connection between the described staff misconduct and either Biscayne's insolvency or the Bank Board's April 6 decision to appoint a receiver." Br. Opp. 4 (emphasis in original). It is true the district court found that the Bank Board "did not create Biscayne's insolvency," finding instead that such insolvency resulted from unprecedented market conditions causing unprecedented losses industrywide. *See* App. 3, 36, 88. The district court did find, however, a direct causal link between the Bank Board's conduct and the appointment of a receiver for Biscayne. Even the court of appeals conceded (App. 6) that "[Bank] Board approval was a prerequisite" for any recapitalization of Biscayne, but the agency "refused to seriously consider proposals . . . to alleviate Biscayne's financial crisis." *Id.* Having obstructed all efforts at recapitalization, the agency

seized the institution because it had not been recapitalized. *See* App. 49-87, 88, 115-23.

The district court found there was "no question . . ., regardless of the testimony of the Board members," that by March 23, the decision on the recapitalization "was a *fait accompli*," and that all alternatives short of seizure had been excluded from consideration. App. 84. In view of that, "the facts as they unfolded subsequent to March 17 are only pertinent to the extent that they ultimately resulted in the Board adopting Resolutions 83-184 and 83-185 [App. 155, 158]. The latter resolution called for the appointment of a receiver," App. 86-87, which occurred, of course, on April 6. *Id.* at 19. The district court found that the conduct reached "a level which can only be described in its totality as outrageous," *id.* at 118, and "that the agency . . . acted arbitrarily and capriciously." *Id.* at 123.[5]

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[5]Equally misplaced is the suggestion that no less drastic remedy was available to the Bank Board. Br. Opp. 9. The district court made no such finding. App. 99. The district court actually found that certain of the FHLBB staff had determined to recommend "one of the least drastic measures," *id.* at 80, the "shopping" of Biscayne, *id.* at 79-80, but thereafter all alternatives short of seizing the institution were deleted from favorable consideration. *Id.* at 86.

It is instructive to note that the Bank Board did not assert an "impossibility" objection when, pursuant to the district court's ruling, Biscayne reported it was working toward "recapitalization of the institution by private capital and by sale of certain assets of the institution." Tr. of Hearing, Nov. 8, 1988, at 9. *See generally Elliott v. Federal Home Loan Bank Board*, 233 F.Supp. 578, 583-84 (S.D. Cal. 1964), *rev'd*, 386 F.2d 42, 44-45 & n.2 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968) (institution successfully restored to former management after enormous losses while in lengthy receivership). At bottom the agency now urges as a defense the incorrect claim that its own wrong cannot be rectified.

CONCLUSION

The court of appeals judgment approved the arbitrary seizure of an institution having an undisputed value of $30 million, thus depriving 1,467 shareholders of their property. The decision is manifestly incorrect, has undisputed precedential importance, and is in conflict with the decisions of this and other courts. Petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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